WELCOME TO SETON HALL LAW SCHOOL!!

MSJ Orientation

MSJ Orientation will be held from 6 p.m. – 8 p.m. on Tuesday, May 31, 2011 in the Faculty Library (5th Floor). Dinner will be served and parking will be validated if you park in the Central Parking garage located at 42 Mulberry Street. Please confirm your attendance by e-mailing Helen A. Cummings at helen.cummings@shu.edu or by calling 973-642-8380.

Your First Class

The Legal System: Research & Writing I will meet on Mondays and Wednesdays from 6 p.m. – 9 p.m. Classes begin on Wednesday, June 1, 2011 and end on Wednesday, July 20, 2011. There will be a few select class sessions which will not meet face-to-face but will instead take place online through Blackboard (see Blackboard section on page 2 and attached instructions). Further details regarding the online sessions will be set forth in the Syllabus which you will receive the first night of class.

Textbooks

The textbook being used is: John C. Dernbach et al., *A Practical Guide to Legal Writing & Legal Method*, (4th Ed., 2010), Aspen Publishers,. ISBN # 9780735591899.
You will also need to purchase: The Bluebook: A Uniform System of Citation (Nineteenth Edition) and it is highly recommended that you purchase a Legal Dictionary.

Your books can be purchased online through the Seton Hall Law School Bookstore http://www.shu-law.bkstr.com/. You can also purchase your books by calling 973-642-8569 (ask for Pete) or by e-mailing the bookstore at shu-law@bkstr.com. You can have your books shipped to you directly or you can pick them up at the Bookstore. *Please keep in mind that you must have completed your first assignment (see below) before class begins* so I recommend that you get your books as early as possible. The Bookstore will remain open until 7 p.m. on the day of Orientation so if you have not yet purchased or picked up your books you can do so before Orientation begins (please make sure to arrive early, as the line in the Bookstore can be quite long at the beginning of the semester).

Your First Assignment

Prior to your first class, please read Chapters 1 and 2 in Dernbach. Also, please read Foundations of the Law, American Governmental Structure (Chapter 4 - pp. 73-99) which is enclosed.

Health Form

The State of New Jersey requires all students provide basic health information, including immunization information, to their institutions. The enclosed form must be submitted to the Seton Hall University Health Services Immunization Coordinator by August 1, 2011 or ***you will have a registration hold placed on your account which will prevent you from being registered for Fall classes.*** Most students need to visit their primary physician in order to have the form correctly filled out so please plan accordingly.

The Health Form is enclosed and can also be found at:
http://www.shu.edu/offices/health-services-forms.cfm

If you have any questions about the form, please contact Health Services at 973-761-9175. **Please submit the form directly to Health Services – do not return it to the Law School.**

Blackboard & Laptop Computers

The Law School utilizes electronic classrooms through a system called "Blackboard." Some professors use Blackboard to post reading assignments, make announcements, answer questions and conduct online discussions regarding the course material. Your first two courses, The Legal System: Research & Writing I and II, will use Blackboard extensively. You will need to have home or work access to a computer (and the internet) or else you will need to use the Computer Lab at the Law School in order to participate fully in your classes. Blackboard is accessed through the LawNet (PirateNet) system. Through the LawNet System, you will be able to access to your Seton Hall email account, Blackboard, registration tools, and other important student services and information.

Instructions for accessing LawNet, Blackboard, and your Seton Hall Law email are enclosed. Your LawNet and Blackboard accounts may not become active until right before classes begin.

While MSJ students are not required to purchase laptop computers before entering Law School, we highly recommend that you own or have access to a Laptop computer, especially for taking exams. If you need to buy a Laptop, please contact our Legal Computing Department and review the information at:

http://law.shu.edu/it/Students/Laptop-Purchase.cfm

Financial Aid

ALL MSJ STUDENTS INTERESTED IN FINANCIAL AID FOR ANY OR ALL SEMESTERS MUST FILL OUT AND RETURN THE ENCLOSED 2011 SUMMER MSJ FINANCIAL AID APPLICATION. YOU MUST FILL THIS OUT EVEN IF YOU DO NOT NEED FINANCIAL AID

FOR THE SUMMER SEMESTER, BUT ARE INTERESTED IN FINANCIAL AID FOR THE FALL AND/OR SPRING INSTEAD.
In order to receive federal or private student financial aid, students must be enrolled on at least a half-time basis. This means you must take at least **five credits** in the Summer and **six credits** in the Fall and Spring semesters. If you need assistance in planning your course schedule to meet the credit minimum, please contact Helen A. Cummings, at helen.cummings@shu.edu or by calling 973-642-8380.

If you are considering or will be funding any part of your education through federal and/or private loans, please see the enclosed Summer 2011 Financial Aid Procedures, MSJ Summer 2011 Financial Aid Application (which must be returned to the Office of Financial Resource Management), and the Financial Aid Booklet. The Office of Financial Resource Management can be reached at 973-642-8850/8733.

Please note that if you will be seeking financial aid for the 2011 Summer semester, **you must fill out the 2010-2011 FAFSA.** If you will be seeking financial aid for the Fall and Spring semesters as well as Summer, you must fill out **both** the 2010-2011 FAFSA and the 2011-2012 FAFSA. Please visit www.fafsa.ed.gov to fill out your required FAFSA.

Recommended Reading List

Please see enclosed Recommended Reading List.

Academic Policy

Please see enclosed Academic Policy.

Academic Calendar

The Academic Calendar for the 2011-2012 academic year is enclosed. Please note that Fall classes begin on August 22, 2011. Also, please note the exam periods for both the Fall and the Spring Semesters. **Do not make any plans to be away during the exam periods!** Your exams can be scheduled for any day during the exam period and exams are not re-scheduled due to business or personal scheduling conflicts. All evening classes (6 p.m. and later) will be scheduled for evening exams but they can be on any weekday. The exam schedule is posted approximately six to eight weeks before exams begin.

Class Schedule for Fall '11 and Spring '12

The Fall 2011 Registration Handbook is on the Law School's Website at http://law.shu.edu/Students/academics/curriculum/Registration-Information.cfm.

The Registration Handbook lists the MSJ course schedule in a separate section after the JD course schedule, typically the last 2-3 pages of the Registration Handbook (MSJ courses are designated by Section "zz"). Please take the time to read through the general information

applicable to all students, whether MSJ, JD or LLM, located in the first approximate twenty pages of the Registration Handbook. You will find important information regarding course exam information, registration deadlines, course withdrawal and refund information, among other important sections. Please note that because you are an incoming student, you will not be able to register for the Fall semester during the registration period of April 12. However, you will be able to register for the Fall semester once you begin classes in June.

Exams

Each semester's Registration Handbook advises which courses have **In-class Exams**, which courses have **Take-home Exams** and which courses have **Self-Scheduled Exams**. Your first exam will be Business Law in Fall '11 and will be an **In-class Exam**. For future courses, it is your responsibility to find out what type of exam is being offered in any course you take (first check the Registration Handbook, then read the syllabus and finally, if you can't figure out which type of exam is required for the course, ask the professor teaching the course). It is also your responsibility to familiarize yourself with the procedures for each type of exam. See Exam Procedures on the MSJ homepage and the Registrar's webpage on Exams & Grading. If you have any questions or do not understand any of the exam procedures, please ask well in advance of the beginning of the exam period!

Regardless of which type of exam you are taking, you will need to have updated software on your Laptop in order to properly download and upload your exam. Again, do not wait until the exam period to try and update your software. Look for signs posted around the Law School prior to exams which will advise you of software update procedures and check MyLaw for updates.

FOUNDATIONS OF THE LAW

An Interdisciplinary and Jurisprudential Primer

Bailey Kuklin
Professor of Law
Brooklyn Law School

and

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Brooklyn Law School

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CHAPTER FOUR

AMERICAN GOVERNMENTAL STRUCTURE: ITS IMPACT ON LAW

- **Introduction**
- **A Sketch of the Constitutional Structure**
- **Constitutional Concepts Impacting Law**
    - **Federalism**
        - **Consequences of Federalism**
    - **Separation of Powers**
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        - **Justiciability and Related Doctrines**
        - **Ripeness, Mootness, Political Question**
        - **The Counter-Majoritarian Difficulty**
    - **Checks and Balances**
    - **Guarantees of Individual Rights**
- **References for Further Reading**

Politics and government have pervasive influences on modern life. Law is no exception. Chapter Three discussed the influence of political theory on law. As used in Chapter Three, we discussed politics in the broad sense: theories of interpersonal relations; the relation of persons to government; the distribution of power in society. In this chapter, we use the term politics in the narrow sense of referring to particular political arrangements or institutions used in operating a government. Specifically, we examine United States political norms, governmental structure, and political/governmental institutions that exert a strong pull on American legal theory, doctrine, and outcomes.

The United States was born in a burst of politics. In addition to the obviously military aspects of the American Revolution, the process of breaking away from England was spurred by political theory regarding governance and also eventually by well-conceived governmental institutions. The Founders did not wish to eradicate all traces of British influence. Quite the contrary -- the United States retained many aspects of the British legal system: powerful judges; the jury system; the adversarial system; and the common law (all discussed at greater length in Chapter Five). But much of the object of the Revolution was to be not only separate from Great Britain but also different. To that end, the Framers established a governmental

structure with distinct aspects that exerted influence on America's subsequently developing legal establishment.[30]

A Sketch of the Constitutional Structure.

The famous American model of government institutions did not develop overnight. The former colonies were initially resistant to the establishment of any strong, central government, fearing that it might possess the same disregard of local interests and rights they had seen from the Crown. Consequently, the first step toward modern America was the Articles of Confederation, a pact between the states proposed by the Continental Congress in 1777, but not ratified until 1781. The Confederation was, of course, replaced by the Constitution (drafted in 1787), which became effective in 1789.[31]

Despite its short tenure, the seldom-read Articles provide an interesting window into the evolving views of the founders. Under the Articles, there was national governance of sorts, but without the broad powers found in the current Constitution. There was no national judiciary and no real national executive, only a skeletal version of national government. For example, the national government could not directly levy taxes or regulate commerce. Under the Articles, a Congress composed of state-selected delegates met briefly each year and a congressionally selected "Committee of the States" could exercise some quasi-executive national power when Congress was not in session.

Although the Articles provided the national government with certain enumerated powers similar to those provided today under the Constitution's "necessary and proper" clause, which permits the federal government to engage in activities essential to its function, any action by the pre-Constitutional national government of the Confederation required a super-majority of nine of the thirteen states. As a result, the national government was effectively disabled from taking action on most controversial issues. Nonetheless, the Articles were an important advance in interstate coopera-

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[30] *See generally* GORDON WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION (1992).

[31] For more extensive background on the establishment of the national government, see GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787 (1976); BERNARD BAILYN, IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967).

tion and included, sometimes in clearer language, many of the individual rights and ground rules of government found in the Constitution: common defense against invaders paid for from a common national treasury with levies based on the respective states' property values; full faith and credit between states for the laws and judgments of one another; a right to travel between states; nondiscrimination against interstate commerce; immunity of the federal government from state taxation; cooperation in extradition; and a requirement that interstate agreements or "compacts" be approved by Congress. Within a decade, however, American leaders concluded that the unifying themes of the Articles were inadequate without an established federal government to administer the new nation.

While the Articles were in force, states themselves were developing political structures that in some ways presaged the later federal structure. The legislature was supreme and it was authorized to pass statutes and take action in response to perceived social needs, perhaps too much action. Although the notion of legislative supremacy in governance was established in England's "Glorious Revolution" of 1689 (which also ushered in, along with the famed Monarchs William and Mary, the modern notion of stable government as an aid to economic development), the state legislatures occasionally flexed their muscles in ways that would have made even Oliver Cromwell blush. For example, legislatures during the colonial and Articles of Confederation period frequently exercised powers of eminent domain to seize private lands for public uses, such as building bridges or roads, often with little or no compensation to the owners. Backlash against such episodes brought about the Takings Clause of the current Fifth Amendment, which provides that the federal government may not seize private property without paying the owner just compensation. This same restraint now applies to state governments through the Due Process Clause of the Fourteenth Amendment. State executive branches also developed during the Confederation period. Governors were elected and reasonably powerful, but subject to de jure and de facto political constraints. On the legal front, state courts and the local bars began to develop an American style of jurisprudence separate from the system initially imported from Britain.

Increasing desire to cure the shortcomings of the Articles led to the Constitutional Convention of 1787. The resulting Constitution differed from the Articles primarily by its establishment of a permanent national government with reasonably broad powers to raise revenue, wage war, and legislate regarding interstate and foreign commerce. It also established a Supreme Court for "refereeing" disputes between the national legislature,

the executive, and the states.[32] Although the Constitution continued to provide healthy "breathing space" for the state prerogatives that had spurred the Confederation, the new federal order provided the national government with substantial powers to override inconsistent state law, regulation, or custom.

Organizationally, the Constitution has three primary sections: Article I (the Legislative Article); Article II (the Executive Article) and Article III (the Judicial Article). These Articles in turn establish the three branches of American government. For example, Article I sets forth the organization and selection of the House of Representatives and the Senate and enumerates a long list of express congressional powers, such as the power to tax, declare war, and pass legislation in aid of interstate commerce. Article II establishes the Presidency and outlines a number of the functions of the office (*e.g.*, select a cabinet, nominate ambassadors and judges, and grant pardons).

Article III, the portion of the Constitution that usually receives most attention in legal studies, establishes a Supreme Court and the federal judicial power to decide cases and controversies. Note, however, that Article III does not establish federal trial courts or trial judges but merely permits Congress to do so. The Judiciary Act of 1789 established federal districts and a district judge for each. However, district courts had no general authority over questions of federal law until 1875, nearly a century after the Constitution took effect. Other portions of the Constitution help to establish and secure the constitutional scheme of federalism, separation of powers, and checks and balances, which are discussed later in this chapter. For example, Article IV promotes federalism (the shared power of the states with deference to the rights of the state most closely associated with a conflict) by providing that each state must give full faith and credit to the judgments rendered by courts in other states.

But even as the Constitution was ratified by the required number (three-fourths) of the thirteen states in 1789, the delegates and others acknowledged that it had shortcomings. Most particularly, it was perceived as having recognized insufficient protection of individual rights from the strongly empowered central government. By 1789, ten amendments to the

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[32] Under the Articles, disputes between the states were settled by a committee of congressional delegates in which the members of the congressional tribunal were chosen in a manner strikingly similar to the way in which disputants today select arbitrators under the Rules of the American Arbitration Association. *See generally* Chapter 5 regarding dispute resolution.

Constitution were drafted (collectively known as the Bill of Rights), with the requisite number of states ratifying them by 1791. These amendments establish most of the American freedoms so frequently debated by the public and invoked during political campaigns: freedom of speech, press, and religion (the First Amendment); right to bear arms (the Second Amendment); protection against unreasonable searches and seizures (the Fourth Amendment); the right to just compensation if the government takes private property (the Fifth Amendment); the right to due process of law before the government deprives one of life, liberty or property (the Fifth Amendment); the right to a fair criminal trial (the Sixth Amendment); the right to a jury for civil suits in federal court (the Seventh Amendment); and protection against cruel and unusual punishment (the Eighth Amendment).

The Ninth Amendment, which reserves rights to the people, and the Tenth Amendment, which reserves rights to the states, are regarded by most commentators as nice bits of political rhetoric but essentially legal dead letters. However, even these atrophied amendments occasionally have some bite. For example, the famous case of *Griswold v. Connecticut*,[33] which struck down a state law limiting use of contraceptives by married couples, did so in large part on the basis of the law's intrusion on a perceived constitutional right to privacy derived from the thrust of the First, Fourth, Fifth and oft-forgotten Ninth Amendments. Although controversial, *Griswold's* right to privacy has proven to be one of the more powerful constitutional developments. For example, it provided the main underpinning of the controversial decision in *Roe v. Wade*[34] limiting state rights to proscribe abortion. Although *Roe v. Wade* has been under attack since its inception, the notion of a constitutional right to privacy continues to enjoy wide public support. Distinguished former judge and law professor Robert Bork learned this when he disputed the existence of a constitutional right to privacy, this becoming what many regarded as the death knell of his unsuccessful nomination in 1987 to the Supreme Court.

Of the constitutional amendments enacted after 1791, by far the most important are those enacted in the wake of the Civil War. Many observers in fact view the Civil War and its aftermath as essentially a second American Revolution and a de facto second Constitutional Convention brought on by America's need to resolve the issues of union, rebellion,

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[33] 381 U.S. 479 (1965).

[34] 410 U.S. 113 (1973).

slavery, and their continuing impact on the nation. The Thirteenth Amendment outlaws slavery and involuntary servitude. The Fourteenth Amendment extends the important protections of the Fifth Amendment to persons aggrieved by the actions of state government by providing that no state may deprive a person of life, liberty or property without due process of law. It also introduces the important concept of equal protection into American jurisprudence in stating that no state may deprive a person of the equal protection of the laws. The Fifteenth Amendment outlaws restrictions on voting rights based on race, color, "or previous condition of servitude."

In addition, these important post-Civil War amendments (all were enacted and ratified during the Reconstruction period from 1865 to 1870) provided Congress with power to enforce them through "appropriate legislation," a prerogative Congress exercised to enact the federal Civil Rights Acts (codified at 42 U.S.C. §§ 1981-1988). These statutes provide a number of private rights of action to persons injured by the discriminatory conduct of state governments, employers, and even other private citizens acting in concert. These laws, along with the anti-discrimination provisions of the Civil Rights Act of 1964 (which makes job discrimination illegal if based on race, gender, religion, or ethnicity) and the Voting Rights Act of 1965 (which requires nondiscriminatory election procedures in state and local government) provide the bulk of federal anti-discrimination law.[35]

To the extent that the Civil War, Reconstruction, and related events gave the United States a "Second Constitution," the new additions strengthened the individual rights aspects of the original constitutional scheme which, despite the Bill of Rights, was largely a Constitution of government organization, at least as applied by the courts. Even the new powers of the Civil War amendments saw limited application by the judiciary for many years. However, during the 20th century, particularly in the period from 1950-1980, the judiciary increasingly gave broader construction to the individual rights aspects of constitutional and statutory law. Since 1980, the federal judiciary has become increasingly resistant to this jurisprudence, but

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[35] The 1964 Civil Rights Act was amended significantly, mainly to strengthen it, in 1972 and 1991. The 1991 Act was mainly a reaction to several 1989 Supreme Court decisions which Congress viewed as unduly narrowing the scope of both the 1964 Act and the Civil War era civil rights statutes.

Congress has often responded with new legislation specifically broadening the text of civil rights statutes.[36]

By noting the importance of the Bill of Rights and Civil War era amendments, we do not intend to denigrate the other amendments. Some are very far reaching. For example, the Eleventh Amendment provides that federal courts lack power to hear a suit against a state brought by a citizen of a different state. It has been broadly interpreted as constitutionalizing the doctrine of sovereign immunity (the sovereign can do no wrong, at least no wrong that can be righted by a lawsuit seeking damages in federal court).[37] In fact, the Eleventh Amendment can be characterized as an amendment born more of politics than sound legal policy. In *Chisholm v. Georgia*,[38] the Court permitted a nonresident to sue Georgia for overdue debts incurred during the Revolutionary War. Congress, understandably concerned that members' home states might have to pay the Revolutionary War debts they had largely ignored, quickly passed the Eleventh Amendment, relegating creditors to the more hostile arena of state courts. Despite its soiled pedigree, the Eleventh Amendment plays an important part in the federalism of the Constitution.

Other important amendments passed after the Civil War amendments:

- extend voting rights to women (the Nineteenth);
- extend the franchise to persons 18 or older (the Twenty-sixth);
- give the vote to District of Columbia residents in presidential elections (the Twenty-third, but the District still has no voting representatives in Congress); and
- permit the federal government to impose an income tax (the Sixteenth).

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[36] *See* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991); Jeffrey W. Stempel, *The Rehnquist Court, Statutory Interpretation, Inertial Burdens, and a Misleading Version of Democracy*, 22 U. TOL. L. REV. 721 (1991).

[37] *See* Hans v. Louisiana, 134 U.S. 1 (1890).

[38] 2 U.S. 418 (1793).

Although obviously important, many of these isolated or "ad hoc" amendments simply do not have as much impact (and certainly are not as widely litigated) as those in the Bill of Rights or the "Civil War package." Two are embarrassing: the Eighteenth Amendment instituted Prohibition (banning manufacture or sale of alcohol) while the Twenty-first repealed it.

Other amendments are essentially technical. For example, the Twenty-fifth amendment provides that the vice-president becomes chief executive should the president die in office. The Twelfth establishes the electoral college procedure for selecting a president. Even the Twenty-fourth amendment, which outlaws payment of a "poll tax" as a condition of voting, was arguably unnecessary since imposition of such taxes probably violated the Fourteenth Amendment, although courts were reluctant to so hold given the long history of the poll tax, which effectively made voting more difficult for poor people and racial minorities.

New constitutional amendments, however, whether momentous or technical, are few and far between, as one might expect of a system that requires a successful amendment to achieve a two-thirds vote of support from both the House and the Senate, signature by the President, and ratification by three-fourths of the states. In the modern era, two important amendment initiatives have been the Equal Rights Amendment ("ERA") and proposed statehood (or full congressional representation) for the District of Columbia. The ERA, which provided that law should not make distinctions based on gender, passed both houses of Congress but fell just short of the required thirty-eight states' ratification to become a constitutional amendment, even though Congress extended the time available for obtaining ratification. Full congressional representation for D.C. has been proposed for many years but has been resisted on partisan and racial grounds (some opponents fear that D.C., which is 75 percent nonwhite, would routinely elect African-American Democrats as Senators and Representatives). As a result, no amendment favoring the simple proposition of congressional representation for American citizens residing in the nation's capitol has ever been reported out of Congress.

Modern America was born via the Constitution, but in what ways did this birth shape ensuing legal development? The U.S. government structure results in major impact upon U.S. law because of the following aspects of the constitutional scheme:

- Federalism (the division of authority between the federal government and the states);

• Separation of Powers (the division of spheres of authority among the executive, legislative, and judicial branches of government);

• Checks and Balances (the overlapping and mutual authority shared by two or more branches of government over the same subject matter); and

• Guarantees of Individual Rights, primarily those enumerated in the Bill of Rights and the Civil War amendments (*e.g.*, freedom of speech, religion, press; right to bear arms; protection against unreasonable searches and seizure; right to jury trial; equal protection of the laws; guarantee of due process of law).

Constitutional Concepts Impacting Law.

A number of important constitutional doctrines affect the law in ways beyond constitutional adjudication.

Federalism. The American Revolution began as perhaps the ultimate states' rights movement. The colonies chaffed under the yoke of the British Crown and wanted to escape. They were hardly in agreement, however, about what should happen if they won their freedom from England. When Benjamin Franklin admonished the bickering revolutionary leaders that they must all hang together (in the war effort) or hang separately (on the gallows), he not only correctly assessed the military situation but also reflected the internal disagreements among the colonies.[39] Not surprisingly, the newly independent but wary colonies chose an initial form of government (the Articles of Confederation) that gave each former colony as much autonomy as possible under the semblance of a national government. When the Confederation proved problematic, the new states were willing to compromise, but the desire for state autonomy remained. In the resulting constitutional scheme, states therefore retained substantial prerogatives except insofar as the new national government possessed express or strongly implied national powers.

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[39] The colonies themselves where hardly uniform in political viewpoint. Each colony had substantial subpopulations of "tories," political conservatives who opposed the revolution against Britain. In some areas, such as Philadelphia and the planter South, tory sentiment was quite strong.

The judicial branch, in particular, generally requires some express textual constitutional authorization for the exercise of federal power over the states. But a sufficiently strong implicit case for federal power will occasionally carry the day.[40] The intervening 200 years have seen a substantial increase in the relative importance and power of the national government. Notwithstanding this, the states retain great powers. If anything, concern for states' rights may be at a higher level during the period of 1970-1990 than it was during the prior 40 years. During the earlier era, the concern over combating the Great Depression, the popularity of President Franklin Roosevelt and the New Deal, the confrontations of World War II and the Cold War, as well as the struggle for civil rights for minorities in the face of strong pockets of state opposition all led to greater solicitude for the federal government and perhaps more than a little distrust of state governments. After 1970, however, changes in the composition of the federal bench (more Republican appointees), the political climate (an upswing in conservatism), salient political issues (a sense of accomplishment in civil rights; adverse reaction to federally mandated affirmative action efforts; a strong anti-abortion movement), and perhaps the sense that the pendulum had swung too far in favor of federal power brought a renewed judicial solicitude for states' rights.

Whether it is at high tide or low ebb, the notion of formidable state autonomy and somewhat limited federal intrusion into areas of law traditionally dominated by the states is usually referred to under the rubric of "federalism," or (in the almost religiously reverential words of Justice Hugo Black) "Our Federalism."[41] In short, federalism means deference to states in many facets of the legal system and in adjudicating close questions of federal authority. Federalism has shaped many aspects of America's substantive and procedural law. For example, judicial power is divided into separate state and federal court systems that have essential autonomy over their respective spheres of authority.

Despite federalism, the systems abut against one another and overlap. For example, state courts provide the last word on the interpretation of state law subject to review by the Supreme Court for constitutional

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[40] *See* Crandall v. Nevada, 73 U.S. 35 (1867) (finding American citizens enjoy an implicit but inherent right to travel between states); CHARLES BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969) (approving *Crandall's* holding and reasoning).

[41] *See* Younger v. Harris, 401 U.S. 37 (1971) (federal courts generally lack power to enjoin ongoing state criminal proceedings).

questions.[42] However, federal courts have jurisdiction over many disputes simply because they involve parties who are citizens of different states even though their dispute invokes state substantive law rather than federal law. In these "diversity jurisdiction" cases, the federal courts must apply state law, but often find themselves without clear guidance from state court precedent in light of the novelty of the legal question. In effect, federal district courts are then "making" state law when they decide the case. Unless overruled by a subsequent decision of the highest state court or the state legislature, the federal court decisions will stand and tend to influence state court jurisprudence as well.

Technically, a federal court's interpretation of state law is not binding on the state courts, and state interpretations of federal law are similarly nonbinding on the federal courts. In reality, however, federal and state courts effectively share power over issues of state substantive law since the particular adjudications of each court system bind the parties to a lawsuit. The de facto split of authority continues to be an issue. There is substantial current debate over whether to eliminate diversity jurisdiction, which was established as a reaction to perceived local prejudice against nonresidents. In early America, as well, this issue was hotly debated. Federalists embraced the concept of diversity jurisdiction while anti-federalists thought it an unnecessary incursion upon state authority.

Consequences of Federalism. The very structure of the federal court system and its concepts of subject matter jurisdiction, personal jurisdiction, and venue reflect the underlying American notion of federalism:

- Subject matter jurisdiction is the authority of the court to decide a dispute. Federal courts may hear and decide disputes only where the plaintiff has raised a federal question or all plaintiffs and all defendants are citizens of different states and the amount in controversy exceeds $50,000.

- Personal jurisdiction is the authority of the court over a party. Objections in this regard are usually raised by the defendant, who is by definition an unwilling litigant. The plaintiff, by filing the suit, has consented to jurisdiction. Federal courts can exercise authority over a

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[42] *See* Erie R.R. v. Tompkins, 304 U.S. 64 (1938) (federal court adjudicating a case on the basis of diversity jurisdiction must apply state law to decide the case rather than federal common law).

defendant only to the extent that the party has sufficient contact with the state in which the federal court is located.

• Venue is the place of trial, the state in which a federal lawsuit may be heard. The proper venue in federal courts is the state where all the defendants reside or a state that has a substantial connection to the litigation. If no other venue is available, a federal court may also hold trial if all defendants are subject to its personal jurisdiction.

Federal courts are organized along state lines. For example, there exists the U.S. District Court for the Southern District of New York rather than the District Court of the New York City Metropolitan Area (hypothetically encompassing New York City and its suburbs in New York, New Jersey, and Connecticut). Circuit Courts of Appeal also run along state boundary lines. For example, the Second Circuit reviews district court decisions in New York, Connecticut and Vermont. As late as 1800, Federalists proposed that federal judicial districts be drawn without strictly observing state boundaries, but these suggestions never came close to enactment. The issue continues to affect our thinking about judicial administration. For years, Congress has considered splitting the large Ninth Circuit (comprising the states of California, Oregon, Washington, Montana, Idaho, Nevada, and Arizona) into two separate courts but has hesitated largely because it is reluctant to "split" California among two circuit courts.

Federalism thus cannot only mean state sovereignty in an area of state law but also that the national government can often "take over," provided that Congress acts with sufficient clarity. The most important areas of substantive law traditionally regulated by the states are torts, contracts, property, criminal law, family law, trusts and estates, and insurance. Unless Congress acts, disputes raising these concerns are ordinarily decided by state law, even if the dispute is tried in federal court. The presumption in favor of state sovereignty in these core areas is so strong that it is occasionally codified by statute. For example, the McCarran-Ferguson Act (15 U.S.C. § 1011 *et seq.*) provides that the insurance business is, absent certain limited exceptions, left to state regulation unless Congress intrudes in this area through legislation using the clearest of terminology.

A specific federal statute is not necessary to establish a "hands off" presumption regarding federal regulation of traditional areas of state law. For example, although federal courts could, by virtue of diversity jurisdiction, arguably take jurisdiction of more property, divorce, and estates disputes than they do, there have arisen a number of court-created doctrines

causing federal courts to refrain from adjudicating certain of these disputes under many circumstances (*e.g.*, boundary lines, spousal status, child custody, will contests). Various other doctrines (usually referred to as judicial "abstention doctrines") may counsel federal courts to refrain from adjudicating disputes touching too closely upon state law or regulation because federal courts regard such decisionmaking as "imprudent," or excessively invasive even though it is arguably within the federal judicial power. Consequently, federal courts often refer to "prudential" doctrines that impose essentially voluntary (*i.e.*, the courts choose not to act) rather than mandatory limits on their power (*i.e.*, constitutional text or other factors bar the courts from acting). In similar fashion, federal courts generally refrain from deciding constitutional issues when adjudicating a dispute so long as there exist legitimate alternative bases for the decision. This prudential restraint derives not from our notion of national-state federalism but from separation of powers (discussed *infra*). By refraining from decision on constitutional grounds, courts are less likely to invalidate an act or initiative of Congress.

The deference of federal courts to state spheres of law should not seem surprising when one considers the scope of the initial federal jurisdictional mandate. The federal courts are often described as having limited subject matter jurisdiction. By this, we mean that federal courts ordinarily have authority to adjudicate a case only if expressly authorized by the Constitution or valid statute implementing Article III of the Constitution (the Judicial Article). The influence of constitutional federalism on federal courts extends to even the technical minutia of litigating in federal court. For example, a summons and complaint may be personally served upon a defendant or can be served pursuant to any measures allowed by the state in which the federal court is located.

The federal courts, because of the prevailing ideology of federalism, generally take a restrictive view of both subject matter and personal jurisdiction. They also tend to take a somewhat restrictive view regarding the applicable substantive law. Regarding the law to be applied in diversity cases, for example, the interest in national consistency held the edge over the interest in state prerogatives during the period of 1867-1938, resulting in the application by federal courts in diversity cases of a "federal common law" of torts, contracts, etc. Since 1938, state prerogatives have held sway

and federal courts exercising diversity jurisdiction have been required to apply state law in adjudicating the dispute.[43]

The law of personal jurisdiction reflects similar tensions between state and national power. The Fifth and Fourteenth Amendments provide that one may not be deprived of life, liberty or property without due process of law. Federal and state court civil judgments certainly implicate the property interests of litigants and, as a practical matter, their liberty interests as well (particularly in cases involving injunctive relief). Consequently, the Due Process Clause applies. However, due process is measured by the defendant's contact with the forum state rather than through an exclusively practical assessment of the fairness or inconvenience faced by a nonresident defendant. This approach occasionally leads to results seemingly at odds with common sense. For example, the U.S. District Court for the District of New Jersey in Newark cannot extend its jurisdictional reach a mere 10 miles over a resident of Manhattan who never crosses the Hudson River. But the federal court for the Northern District of California in San Francisco can hear a case against a resident of San Diego, more than 500 miles away. This discrepancy is, of course, not explained by common sense, or the lack of it, but by Federalism.

Federalism notions are not historic relics but continue to animate modern debate over changes in federal law or rules of court. Perhaps the leading example is the long-running debate over the continued existence of diversity jurisdiction. Many argue that the concept has outlived its usefulness due to the increasing integration and homogenization of the nation. Others argue that state and local prejudices continue to persist and that state judges, most of whom are elected in some form and do not enjoy the job security of federal judges, are insufficiently independent or courageous to defuse such biases. The solution to date has been, perhaps to no one's surprise, a compromise between the warring factions. The required "jurisdictional amount" for a court to have diversity jurisdiction has been raised from $10,000 to $50,000, but diversity remains, in effect suggesting that the collective sense of Congress found it wise to maintain the availability of the "neutral" federal forum for sufficiently important cases (with importance measured in dollars).

Separation of Powers. While federalism addresses tensions in the distribution of state and national authority, separation of powers focuses on tensions

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[43] *See* Erie R.R. v. Tompkins, 304 U.S. 64 (1938), *overruling* Swift v. Tyson, 41 U.S. 1 (1842).

in the distribution of the powers concededly held by the national government. A typical high school civics class posits that Congress makes laws, the President enforces laws, and the federal courts adjudicate disputes over the meaning and application of the laws. Although American government in practice is considerably more complicated, the basic tripartite scheme exerts a powerful pull on the behavior of federal courts. Whether Congress and the President (and other executive branch employees) have as healthy a regard for separation of powers poses a more vexing question. Courts, at least, have historically tried to "play it straight" in observing sufficient deference to the other branches. Although persons in disagreement with a recent case frequently complain about "judicial activism," federal courts usually encroach upon the arguable turf of Congress and the Executive only after considerable and self-conscious reflection. Much more commonly, federal courts defer to the other branches, perhaps far more often than is required in the interests of erring on the side of a constrained judicial role.

Perhaps judicial self-restraint remains fashionable because the federal bench appreciates its essential weakness should a free-for-all erupt. Alexander Hamilton described the Judiciary as the "least dangerous branch" in the sense that the bench cannot levy and collect taxes, raise an army, or directly reorder society.[44] In practice, of course, judicial decisions frequently play a substantial role in national policy and have palpable distributive consequences, affecting the redistribution of wealth in society. However, courts exercise less sheer brute strength upon their subjects than do legislatures or executives. For the most part, it is generally easier to disagree with and reason with a judge than a policeman, a tax assessor, or a legislator. Many argue that the flexibility one does occasionally find in executive branch officials stems significantly from the possibility of judicial scrutiny and legal liability.

If a real collision occurs between the branches, conventional wisdom holds that the court would lose to either the President or Congress provided that the other branches acted in accord with popular sentiment. To be sure, court decisions can influence popular sentiment, but only through their institutional reputation and respect as well as the persuasiveness of their reasoning, language, and result. In demarcating their sphere of authority,

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[44] *See* THE FEDERALIST No. 78 (Alexander Hamilton) ("The Judges as Guardians of the Constitution") (one of a series of "Federalist Papers" authored by James Madison, Alexander Hamilton, and John Jay as political brochures designed to encourage ratification of the Constitution). The label has achieved long-lasting notoriety.

the courts have reduced what seemingly is a matter of politics, policy, and "feel" for the situation to a series of legal doctrines that operate at a seemingly objective, non-political level.

Standing. Foremost among these legal doctrines reflecting political constraints are "standing" and "justiciability," which has spawned subdoctrines of "mootness," "ripeness," "political question," and the prohibition against federal courts rendering advisory opinions. Virtually all state courts share these doctrines in a degree similar to federal practice. Two notable exceptions are Massachusetts and Maine, which permit their state supreme courts to issue advisory opinions. All of these doctrines are based, at least in part, on separation of powers concerns in that they seek to confine the judiciary to traditional judicial activity -- deciding cases -- and to prevent the courts from slipping into a more direct policymaking role.

The Supreme Court has stated, in fact, that the doctrine of standing rests *solely* on separation of powers concerns.[45] This seems an overstatement. Even absent separation of powers concerns, courts would probably adopt some version of a standing doctrine in order to conserve judicial resources and in order to be prudent: cases brought by persons lacking a sufficiently tangible stake in a matter are less likely to provide the optimal context for rendering sound legal judgments. The Court has itself acknowledged this in a number of opinions.

Standing requires that a party bringing a suit be sufficiently appropriate to prosecute the litigation. If the plaintiff lacks standing, federal courts will not hear the case. To have standing, a plaintiff must have a direct and palpable interest in the controversy out of which the case arises. A speculative, overly ethereal interest or one that is too attenuated from the focus of the harm alleged does not suffice to confer standing on a plaintiff. In typical private litigation, the standing analysis is easy: If A hits B, B has standing to sue A for the damages caused by the blow. B is directly and concretely affected by the incident and is financially and personally concerned about the outcome of litigation regarding the attack. B's friend C is not directly affected and therefore lacks legal standing to sue A, no matter how outraged or emotionally distraught C becomes as a result of A's aggression. But if C is a spouse or child of A or financially dependent on A, courts may view C as having sufficient standing to sue.

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[45] *See* Allen v. Wright, 468 U.S. 737 (1984).

Standing doctrine gets tougher when suits are brought against the government. For example, to have standing to challenge a government policy, a plaintiff must be affected by the challenged policy in a manner reasonably concrete, direct, and nonspeculative. In many but not all instances, organizations have been permitted to raise claims on behalf of members or clients. The notion of organizational representation undergirds much "public interest litigation" in which associations seek to represent members or allied persons who would individually have standing but who as a practical matter lack the individual time or resources to pursue the required litigation. Suits by environmental groups such as the Natural Resources Defense Council or the Environmental Defense Fund are classic illustrations of organizational standing. On the conservative side of the political ledger, organizations like the Chamber of Commerce serve the same function.

Standing doctrine restricts political activists from pursuing a claim challenging the political status quo unless the activist is quite directly impacted or has the organizational proxy of one who is directly impacted. Consequently, standing doctrine tends to push more of the battles brought by political activists into the legislative or executive arenas. As one might therefore expect, most of the close, difficult, and hard-fought standing battles are waged over cases with political implications.

As in so many other areas of law, application of standing doctrine correlates with the personal political preferences of the bench. The relatively liberal Warren Court of 1953-1969 adopted a broad view of standing and for a brief moment even hinted at allowing a plaintiff's status as a taxpayer to confer standing in the politically sensitive cases discussed above.[46] The Burger Court (1969-1986) and the Rehnquist Court (1986-present) significantly restricted standing to those with a quite direct and immediate interest in challenging government action and clearly rejected any semblance of taxpayer standing.[47]

Justiciability and Related Doctrines. Whether Smith or Jones, or the Sierra Club or the National Association of Manufacturers, or whomever,

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[46] *See* Flast v. Cohen, 392 U.S. 83 (1968).

[47] *See, e.g.*, Allen v. Wright, 468 U.S. 737 (1984); Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982).

has a claim that courts will adjudicate to a final judgment hinges on the doctrine of justiciability. The Supreme Court has stated that in determining whether a matter is justiciable, it looks for a plaintiff with standing and a matter traditionally viewed as capable of resolution by the judiciary in a manner which does not place the courts in a position of intruding upon the proper sphere of another branch of government. Although the issue of justiciability is considerably more complicated than our brief treatment here might suggest, a court's essential inquiry in determining justiciability asks whether the action walks, talks, and seems like a lawsuit seeking a traditional judgment (such as an award of damages or an injunction). If it does, the matter is ordinarily justiciable, even if it requires the court to pass judgment on actions of the other branches, so long as the court is legitimately deciding a concrete controversy over a subject that is not textually committed by the Constitution to either the legislative or executive branch. As Chief Justice John Marshall stated long ago, it is the province of the judiciary to say what the law is.[48] Implicitly, saying what the law is occasionally requires the court to say that Congress or the President has violated the law.

As in the case of standing, justiciability in the ordinary case is not a particularly difficult issue. When B sues A for hitting him in the hypothetical discussed earlier, the issue looks much like any tort case. One party seeks a judgment for damages against another party. Such a judgment will for all practical purposes conclude the matter, at least as far as the law is concerned. Rendering the judgment will not intrude upon either the legislative or the executive branch, absent unusual special factors.

As with standing, courts determining justiciability look for real rather than speculative disputes, using the concreteness of the situation as a signal that the matter is more like a typical lawsuit and less like an invitation to judicial policymaking or public criticism of another branch of government. Where a plaintiff requests nontraditional relief, such as a complex injunction, this may give rise to more serious questions regarding justiciability. For the most part, the novelty of the relief sought does not preclude adjudication, at least not if the suit is sufficiently concrete and the relief apt in relation to the harm alleged.

Ripeness, Mootness, Political Question. In determining a lawsuit's fitness for judicial resolution, courts apply subsets of justiciability: ripeness; mootness; and the political question doctrine. A case is not ripe

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[48] Marbury v. Madison, 5 U.S. 137 (1803).

if the harm alleged is not sufficiently certain to occur. A case is moot if the harm alleged has been corrected by nonjudicial means before the case is heard. Federal courts will decline to decide a case that requires them to supplant either Congress or the Executive in an area of policymaking deemed committed by the Constitution to one of those branches in a manner precluding judicial review.

For example, under the political question doctrine, the Supreme Court has declined to decide cases where it has been asked to review a decision of the President to grant a pardon or grant diplomatic recognition to a country. The Court has also declined to adjudicate congressional election disputes (*e.g.*, did Smith or Jones win the nip-and-tuck election in the Eighth Congressional District), except insofar as it has set broad parameters on the grounds and procedures Congress must employ in determining membership.

Standing and justiciability doctrines would not exist in the American form were it not for concern over safeguarding separation of powers, which has led to more emphasis on judicial restraint in the U.S. than in other countries. For example, continental Europe has nothing to rival the American focus on standing and justiciability, although a weaker version of these doctrines appears to exist in order to conserve judicial resources and sharpen courts' decisionmaking. Even in England, the primary model of the American system, these notions are less important since England's notion of separation of powers is far more relaxed than that prevailing in the United States. The legislative and executive functions have been fused in Britain and the political system is unitary rather than federal. American notions of separation of powers are virtually nonexistent. The judiciary, although arguably similar to America's in terms of independence, simply has never been required to be as concerned with intrusion upon the rest of the political structure. In addition, as defenders of the British system are quick to point out, England fobs off fewer of its difficult public policy questions (*e.g.*, integration, abortion) on the judiciary.

American courts and commentators have also promoted judicial restraint more than have their counterparts in other countries. Unique features of the federal bench and American notions of separation of powers explain much of this concern as well. As compared to other countries, the U.S. bench (both federal and state) is unusual in that it results from a political, semi-partisan process in which judges are chosen at relatively advanced stages of their careers from various walks of the legal profession. By contrast, European judges train to be judges (rather than practicing

lawyers), start at entry level judging positions, and advance (if they advance) upward in a bureaucratic system much like civil service in the United States. Thus, although federal judges, like European judges, are not elected, federal judges are more likely to behave like independent political forces than like bureaucrats.[49] As noted above, most state judges in America must face some sort of election. However, for incumbent jurists, this usually involves a so-called "retention election," in which the judge does not run against a competing candidate but is ousted only if a majority of the voters give the judge a negative vote in the abstract.

In addition, the less centralized American model of electoral politics, with less discipline within political parties and less party loyalty among the voters, provides more occasion for people to approach courts with cases charged with political import. Under these circumstances, the constitutional structure, which envisions federal courts at least officiating between the other branches of government (often divided in control between Republicans and Democrats), permits courts more of a role in adjudicating cases with political implications. This larger judicial role, in turn, has led to more concern that it be exercised with restraint.

The Counter-Majoritarian Difficulty. The so-called "counter-majoritarian difficulty" is typical of such concern for judicial restraint. The difficulty as generally identified is this: federal judges, who are not elected, are able to set aside or penalize the actions of elected representatives and the President. This seems inconsistent with the democratic principle that the will of the majority should govern policy outcomes. Most lawyers resolve the difficulty by concluding that the Constitution, which became law through super-majoritarian procedures, creates this situation. In addition, the bench is tinged with electoral accountability in that: judges must be nominated by the President and confirmed by the Senate; Congress and the President can respond to unfavorable court decisions by changes in the budget, jurisdiction, or other aspects of the courts; Congress and the President can also override disfavored court decisions through new legislation or (in extreme cases) constitutional amendment.

All of these responses, of course, fail to eradicate the counter-majoritarian difficulty but only make it acceptable (to Lockean conservatives

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[49] *See* Mirjan R. Damaska, *Two Faces of State Authority: The Hierarchal and Coordinate Models*, 97 YALE L.J. 341 (1987) (suggesting that differences in systems explain why American judges are more prestigious and have more powerful impact on society as compared to European judges).

and welfare state liberals) or sufferable (to Burkean conservatives).[50] Federal judges remain unelected officials with substantial power who cannot be fired unless they commit a crime or something similarly disreputable. However, the difficulty is deemed by most as sufficiently muted to permit courts to venture significantly into charged political areas without serious political problems. Despite the oft-heard complaints about judicial activism and legislating from the bench, most political elites and informed people accept the active American judiciary, in part because there seems no realistic alternative.

As Alexis de Tocqueville wrote nearly 200 years ago, nearly every political issue in America ultimately becomes a judicial issue.[51] He was largely correct then and the sentiment remains largely correct today due to the constitutional structure, the American political system and culture (*see* Chapter Five regarding dispute resolution and the adversary system), as well as 200 years of historical reinforcement. In short, America has a politically involved judiciary because it has chosen it, although perhaps tacitly or even inadvertently. However, the United States attempts to keep the activist judiciary in check through doctrines like justiciability and standing as well as the notion of judicial restraint.

A particular example perhaps gives some flavor to the complexities of the issue. Traditionally, courts interpreting statutes have sought to effect the design of the legislature that drafted the statute. Judges, particularly in the modern era, have shown substantial disagreement over how best to accomplish this goal. Some argue that courts should be textualist in approach and focus, perhaps exclusively, on the plain language of a statute. Others argue that courts must also pay considerable attention to the indicia of congressional intent contained in the legislative history of the statute (*e.g.*, committee reports, hearing testimony, floor statements, failed amendments, adopted amendments, and so on). Others argue that courts should take even a broader view of effectuating congressional will and consider the overall purpose of the statute (*i.e.*, what the statute was designed to correct, what state of affairs Congress hoped to bring about) and interpret the law to achieve the purpose, even where this requires

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[50] Lockean conservatives generally subscribe to the views of political theorist John Locke (1632-1704), while Burkeans ally themselves with the thoughts of Edmund Burke (1729-1797). *See* Chapter Three on political philosophy.

[51] *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (1832).

evolution of the law's meaning beyond the original specific expectations of the legislature.[52]

Jurists who profess a Burkean conservatism and greater concern for separation of powers and legislative hegemony tend to argue for greater reverence for text, viewing it as both the only "real" positive law before the court and the most precise embodiment of legislative sentiment. Lockean conservatives and liberals as well as pragmatists tend toward more eclectic approaches to statutory construction that blend analyses of text, intent and purpose. They see a greater judicial role in avoiding overly literal textual interpretation that may result in "poorer" law. They view this as helpful to the legislature. In addition, pragmatists emphasize that an overly grudging interpretation of a statute may only thwart legislative intent and increase the burden of lawmaking by needlessly forcing Congress to amend or reenact a statute.

Regardless of one's judicial politics, separation of powers concerns are important in framing the debate. In a system different from that of the United States, judicial statutory interpretation could logically be quite another story. Indeed, it appears that courts in continental Europe are relatively more inclined to pursue a "free inquiry" into statutory meaning and seek the "best result" regardless of the seeming views of the enacting legislature or the enforcing executive since European political systems are far less concerned with separation of powers than is the United States.

Checks and Balances. The notion of checks and balances is a refinement of the idea of separation of powers. The latter notion refers to delineated spheres of authority between the branches of government. In other words: what prerogatives belong (in the main) to which branch? Checks and balances, however, refer to the manner in which the various branches operate as a check on their own power and the power of one another regarding implementation of a single policy item. For example, Congress passes legislation (bicameralism -- the need for a bill to pass both the House and Senate is itself a check of sorts) but the President can veto the bill and prevent it from taking effect. Congress can then override the veto by a two-thirds vote. But the legislation may still be vulnerable to the Supreme Court holding part or all of it unconstitutional (or interpreting it more narrowly or broadly then expected).

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[52] *See* WILLIAM N. ESKRIDGE, JR. & PHILIP FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 569-638 (1987).

Thus, the branches check one another at various stages of the history of a single piece of legislation. This is different from, for example, the primary authority that the Executive has over waging war (separation of powers), the Senate's control over its own membership and procedures (separation of powers again), or the inherent power of courts to administer trial proceedings, holding parties in contempt if necessary (separation of powers once again). Checks and balances include not only the checking function placed in the linear path of a statute or policy but also involve a substantial element of colloquy between the branches. The checking function often operates as a circular weave rather than simply a series of hurdles.

For example, assume a suddenly radicalized Congress enacts massive land reform that takes significant parcels of real property from the rich and gives it to the poor. The President vetoes, wanting to protect wealthy persons, who have been a substantial part of his support over the years (his own family assets are also on the line). Congressional leadership plans a vote to override the veto.

Although the legislation originally passed by a 3-to-1 vote, the President can appeal to a number of legislators based on party loyalty ("if we decimate our biggest supporters, our party is history"), ideological persuasion ("they tried this in the former Soviet Union and Cambodia and both were disasters"), incentives ("vote with me on the veto and I'll see that the new agency headquarters is located in your district, employing your constituents"), or threats ("vote with me on the veto or your former law partner's nomination to the federal bench is out of the question"). The Presidential checking power extends well beyond the veto in this case. He may elect to veto all bills, even those he would otherwise support, until Congress repeals the objectionable legislation.

Nevertheless, if Congress is sufficiently firm, it overrides his veto, enacting legislation sure to face court challenge. Unless the hypothetical land redistribution scheme is accompanied by "just compensation" as required by the Fifth Amendment (note that the individual rights structure of the U.S. system, discussed below, also affects this dispute), the Supreme Court would probably hold it unconstitutional. At that juncture, the checked piece of legislation returns to the congressional forum, where Congress can either compromise (*e.g.*, by adding a provision to pay for land seizures at market rates, providing just compensation) or attempt to bend the Court to its will (*e.g.*, by restricting the Court's jurisdiction,

enlarging it to permit the addition of new members favorable to Congress, trimming the Court's budget unpleasantly to the bone, etc.).

Which path it chooses depends on the situation. In this hypothetical, the prohibitively high costs of just compensation for massive land redistribution would probably make it a fiscal impossibility. How easily the Court might capitulate in the face of a congressional counterattack varies with other checking factors. The President in this example would likely help the Court by refusing to nominate to a newly enlarged Court any Justices favorable to Congress on this issue.

All of this constitutional sturm and drang undoubtedly would take some time, allowing for at least the cooling of political tempers if not a "return to normalcy" for political preferences. For example, House of Representatives elections occur every two years, making the land reform act a likely topic of a campaign in which wealthy citizens would presumably pull out all the stops to either unseat or reeducate Robin Hood representatives. In the House races, the views of the President and the Court would undoubtedly matter to at least some significant number of voters. Even if opponents of land reform were only partially successful, the combination of time, political opposition, and congressional exhaustion would likely lead to a compromise or the demise of the land reform idea.

No wonder American government and politics is inherently centrist and oriented toward the status quo! Apart from the personal opinions of the electorate, the very structure of American government makes it difficult to implement really radical or extremely divisive policies. This applies to radically conservative initiatives as well. Substitute the notion of repeal of Medicare or Social Security for the land reform scheme in the above example and a similar scenario would unfold. Federal courts, although they attempt to be non-partisan, play an important role in the structure because of their checking role on the other branches. Although it may at times function poorly in this role (through either inadequate resistance to bad ideas, excessive thwarting of useful reforms, or undue deference or hostility to another branch), the judiciary is still intimately involved in the checking system.

For clarity, this chapter has focused on the federal system and federal courts. Because most state systems mirror the federal in substantial regard, the relations between political superstructure and judicial role found at the federal level will also be largely true in the states. To the extent there exist differences, however, issues of localism (in lieu of federalism), separation of powers, checks and balances, and individual rights tend to be

of less concern to states than to the federal government. This is because the federal government is designed under the Constitution as one of limited powers, whereas state governments have general and residual authority over the public welfare.

Guarantees of Individual Rights. As alluded to at various points earlier in this chapter, the American political structure has imbedded into it a baseline respect for individual rights. The Bill of Rights and the Civil War Amendments as well as other aspects of the Constitution establish certain rights by "superlaw" that cannot be curtailed. These individual rights are sacrosanct to whatever degree they are accepted and enforced by the judiciary. As a practical matter, however, individual rights can be diminished to the degree that the federal courts permit this to occur. In rarer cases, the other branches may override decisions of the courts favoring individual rights on the ground that they excessively privilege individual rights over other concerns. Where an anticourt reaction involves passage of a constitutional amendment, it is not only Congress and the President but also the vast bulk of the American polity (remember the necessary ratification by three-fourths of the states) that is required to thwart the Court when it rests its decisions firmly upon constitutional grounds. In the truly extreme case of interbranch conflict, something less than Constitution-amending consensus might roll back individual rights. For example, the U.S. Army might seize and assassinate the Justices for rendering a decision that displeases the President. Fortunately, such scenarios akin to totalitarianism or mob rule are farfetched as applied to the United States.

Although, as discussed above, a host of formal and informal political pressures can be brought to bear on the Court, the constitutionification of important individual rights, such as free expression, open assembly, freedom of worship, fair trials, jury trials, privacy, due process, and equal protection, gives the bench an important power for assessing the application and adequacy of the work product of other corners of government. As also noted, the Supreme Court and lower federal courts are usually sensitive to criticisms of judicial activism and painfully aware of the weaknesses of the judiciary. Consequently, they usually bend in part to pressures brought to bear by other parts of the system. As the saying goes, "the Supreme Court reads the election returns."

But reading the returns does not reduce the Justices to mere automatons. In many instances, the federal bench has resolutely enforced its vision of the law even in the face of popular resistance. For example, many federal judges in the American South displayed great courage and

enforced the Fourteenth Amendment and civil rights laws despite the antipathy of the vast majority of white voters and powerful interests.[53] But, as we have noted, visions of the law in close cases vary with the viewer. Consequently, the most commonly effective means by which other branches alter the Supreme Court's view of the individual rights guarantees of the Constitution (as well as other aspects of constitutional jurisprudence) has been through a change in the Court's membership. For example, when the Court decided that the Constitution placed limits on state regulation and prohibition of abortion,[54] it met a firestorm of criticism. From 1980 through 1992, the Executive Branch (the Reagan and Bush Administrations) was committed to overturning constitutionalized abortion rights through appointing "pro-life" Justices. With the election of President Clinton, the Executive switched completely and expressed a commitment to nominating "pro-choice" Justices.

Despite the political pressures, it appears that no Justice participating in the *Roe* decision of 1973 altered his views on the subject in response to criticism or pressure. To be sure, some post-*Roe* abortion opinions can be read as bending to anti-abortion political forces in cases where the Court upheld state and federal restrictions on abortion funding, procedure, or the consent or notification of the parents of minors. In the main, however, it appears that the Court's drift toward increasing tolerance of abortion restriction during the period of 1973-1992 (with some concern that *Roe* would itself be overruled)[55] resulted from changing Court personnel (the substitutions of Justices O'Connor, Scalia, Kennedy, Souter and Thomas for Justices Stewart, Burger, Powell, Brennan, and Marshall) rather than changing constitutional views.

We present this detour into the abortion controversy not to suggest that law is only politics or merely the personal preferences of the Justices (although politics and personal judicial opinion are often determinative in close or difficult cases) but to underscore how powerful a resolute and

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[53] *See, e.g.*, JACK BASS, UNLIKELY HEROES (1981).

[54] Roe v. Wade, 410 U.S. 113 (1973).

[55] *Compare* Planned Parenthood of Southeastern Penn. v. Casey, 947 F.2d 682 (3d Cir. 1991) (holding that Supreme Court has effectively overruled *Roe* and would explicitly overrule it if directly presented the question) *with* the Supreme Court's decision in the same case, 112 S. Ct. 2791 (1992), which, although upholding many aspects of Pennsylvania law restricting abortion, reaffirmed *Roe*.

unchanging judiciary can be when it acts pursuant to an individual rights guarantee of the Constitution. Whatever the ultimate fate of *Roe v. Wade*, it has had more than a 20-year "run" as the law of the land despite the best efforts of organized interest groups, state legislatures, and four presidents who opposed the decision.

The power of the federal courts regarding individual rights determinations is both a plus and a minus for the judiciary. On the minus side, these powers tend to be a lightning rod for critics and often engender efforts to punish the bench or restrict courts from what many regard as more appropriate tasks. On the plus side, the bulk of the profession appears to agree that the power to decide questions impacting on federal constitutional rights also implies that it would be unconstitutional to so fetter the federal courts that they are unable to perform this role. Certainly, the bulk of the legal profession and political actors have considered it unwise to attempt to destroy or diminish the institution of the federal courts as currently conceived despite disagreement with court decisionmaking. For example, efforts to strip the federal courts of jurisdiction over school busing for desegregation or enforcement of abortion rights have generally been unsuccessful. In a sense, then, both the American political structure (which is hard to change) and American political consensus (which, although relatively stable, could change in an instant) have combined to give the federal judiciary its current role in adjudicating disputes, maintaining political balance, protecting rights, and influencing the ongoing debate over national policy.